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DAVID G. HENRY  
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WOODWAY TX 76712

**COPY MAILED**

**JUL 24 2008**

In re Application of	:	
MCDONALD	:	
Application No. 10/564,242	:	ON PETITION
Filed: September 11, 2006	:	
Attorney Docket No. Garlic – 1 US	:	

This is a decision on the petition under the unintentional provisions of 37 CFR 1.137(b), filed October 9, 2007, to revive the above-identified application. The requisite petition fee has been submitted.

The petition is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(b)." This is **not** a final agency action within the meaning of 5 U.S.C. § 704.

The application became abandoned for failure to reply in a timely manner to the non-final Office action mailed, November 15, 2006, which set a shortened statutory period for reply of three (3) months. No extension of time under the provisions of 37 CFR 1.136(a) was obtained. Accordingly, the application became abandoned at mid-night on February 15, 2007.

A grantable petition under 37 CFR 1.137(b) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(m); (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required by 37 CFR 1.137(d). Where there is a question as to whether either the abandonment or the delay in filing a petition under 37 CFR 1.137 was unintentional, the Director may require additional information. See MPEP 711.03(c)(II)(C) and (D). The instant petition lacks item (1) above, the required reply.

Petitioner sets forth, under item 2 of the present petition, that "[t]he reply and/or fee to the above-noted Office action in the form of Amendment and Remarks" (1) "has been filed previously on 3/15/07 (NOT REC'D/PROCESSED)" and (2) "is enclosed herewith". The United States Patent and Trademark Office (USPTO) has no record of the "Amendment and Remarks" petitioner

urges were previously filed on March 15, 2007. USPTO records also indicate that the present petition was not accompanied by an enclosed "Amendment and Remarks".

Any request for reconsideration of this decision, should be accompanied by evidence that sufficiently establishes, to the satisfaction of the Director, that a response to the November 15, 2006 non-final Office action was, in fact, filed with the USPTO on March 15, 2007 or (2) that an "Amendment and Response" to the November 15, 2006 non-final Office action accompanied the present petition on October 9, 2007. Evidence that sufficiently establishes that an "Amendment and Response" was filed on March 13, 2007 and/or with the present petition on October 10, 2007, should include a date stamped and properly itemized postcard receipt, a complete copy of the previously submitted "Amendment and Response", and a statement that the attached copy of the "Amendment and Response" is a copy of the "Amendment and Response" previously filed with the USPTO.

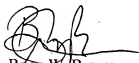
Further correspondence with respect to this matter should be addressed as follows:

By Mail:                      Mail Stop PETITION  
                                    Commissioner for Patents  
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By hand:                     U. S. Patent and Trademark Office  
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                                    Randolph Building  
                                    401 Dulany Street  
                                    Alexandria, VA 22314

The centralized facsimile number is (571) 273-8300.

Telephone inquiries concerning this decision should be directed to Brian W. Brown at (571) 272-5338.



Brian W. Brown  
Petitions Examiner  
Office of Petitions



**PETITION FOR REVIVAL OF AN APPLICATION FOR PATENT  
ABANDONED UNINTENTIONALLY UNDER 37 CFR 1.137(b)**

Docket Number (Optional)  
Garlic-1 US

First named inventor: McDONALD, Robert

Application No.: 10/564242

Art Unit: 1655

Filed: 09/11/2006

Examiner: QUIWEN

Title: METHOD FOR PREVENTING FUNGAL GROWTH IN PLANTS

Attention: Office of Petitions  
Mail Stop Petition  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450  
FAX (571) 273-8300

NOTE: If information or assistance is needed in completing this form, please contact Petitions  
Information at (571) 272-3282.

The above-identified application became abandoned for failure to file a timely and proper reply to a notice or action by the United States Patent and Trademark Office. The date of abandonment is the day after the expiration date of the period set for reply in the office notice or action plus an extensions of time actually obtained.

**APPLICANT HEREBY PETITIONS FOR REVIVAL OF THIS APPLICATION**

NOTE: A grantable petition requires the following items:

- (1) Petition fee;
- (2) Reply and/or issue fee;
- (3) Terminal disclaimer with disclaimer fee - required for all utility and plant applications  
filed before June 8, 1995; and for all design applications; and
- (4) Statement that the entire delay was unintentional.

**1. Petition fee**

- ☒ Small entity-fee \$ 770.00 (37 CFR 1.17(m)). Applicant claims small entity status. See 37 CFR 1.27.  
☐ Other than small entity - fee \$ \_\_\_\_\_ (37 CFR 1.17(m))

**2. Reply and/or fee**

- A. The reply and/or fee to the above-noted Office action in  
the form of Amendment and Remarks (identify type of reply):

- ☒ has been filed previously on 3/15/07 (NOT RECD/PROCESSED).  
☒ is enclosed herewith.

- B. The issue fee and publication fee (if applicable) of \$ \_\_\_\_\_.  
☐ has been paid previously on \_\_\_\_\_.  
☐ is enclosed herewith.

[Page 1 of 2]

This collection of information is required by 37 CFR 1.137(b). The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11 and 1.14. This collection is estimated to take 1.0 hour to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop Petition, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

If you need assistance in completing the form, call 1-800-PTO-9199 and select option 2.

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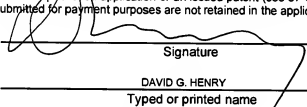
3. Terminal disclaimer with disclaimer fee

- ☒ Since this utility/plant application was filed on or after June 8, 1995, no terminal disclaimer is required.
- ☐ A terminal disclaimer (and disclaimer fee (37 CFR 1.20(d)) of \$ \_\_\_\_\_ for a small entity or \$ \_\_\_\_\_ for other than a small entity) disclaiming the required period of time is enclosed herewith (see PTO/SB/63).

4. STATEMENT: The entire delay in filing the required reply from the due date for the required reply until the filing of a grantable petition under 37 CFR 1.137(b) was unintentional. [NOTE: The United States Patent and Trademark Office may require additional information if there is a question as to whether either the abandonment or the delay in filing a petition under 37 CFR 1.137(b) was unintentional (MPEP 711.03(c), subsections (III)(C) and (D)).]

**WARNING:**

Petitioner/applicant is cautioned to avoid submitting personal information in documents filed in a patent application that may contribute to identity theft. Personal information such as social security numbers, bank account numbers, or credit card numbers (other than a check or credit card authorization form PTO-2038 submitted for payment purposes) is never required by the USPTO to support a petition or an application. If this type of personal information is included in documents submitted to the USPTO, petitioners/applicants should consider redacting such personal information from the documents before submitting them to the USPTO. Petitioner/applicant is advised that the record of a patent application is available to the public after publication of the application (unless a non-publication request in compliance with 37 CFR 1.213(a) is made in the application) or issuance of a patent. Furthermore, the record from an abandoned application may also be available to the public if the application is referenced in a published application or an issued patent (see 37 CFR 1.14). Checks and credit card authorization forms PTO-2038 submitted for payment purposes are not retained in the application file and therefore are not publicly available.

  
\_\_\_\_\_  
Signature  
  
DAVID G. HENRY  
\_\_\_\_\_  
Typed or printed name  
  
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WOODWAY, TX 76712  
\_\_\_\_\_  
Address

4 OCTOBER 2007  
\_\_\_\_\_  
Date  
  
32,735  
\_\_\_\_\_  
Registration Number, if applicable  
  
254 498 1431  
\_\_\_\_\_  
Telephone Number

Enclosures: ☒ Fee Payment

☒ Reply

☐ Terminal Disclaimer Form

☐ Additional sheets containing statements establishing unintentional delay

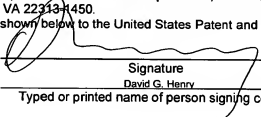
☐ Other: \_\_\_\_\_

**CERTIFICATE OF MAILING OR TRANSMISSION [37 CFR 1.8(a)]**

I hereby certify that this correspondence is being:

- ☒ Deposited with the United States Postal Service on the date shown below with sufficient postage as first class mail in an envelope addressed to: Mail Stop Petition, Commissioner for Patents, P. O. Box 1450, Alexandria, VA 22313-1450.
- ☐ Transmitted by facsimile on the date shown below to the United States Patent and Trademark Office at (571) 273-8300.

\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Signature  
David G. Henry  
\_\_\_\_\_  
Typed or printed name of person signing certificate



**IN THE UNITED STATES PATENT & TRADEMARK OFFICE**

**IN RE APPLICATION OF:**

McDonald, Robert (Deceased)

**SERIAL NO.** 10/564,262

**FILED:** 09/11/2006

**EXAMINER:** Quiwen

**GROUP ART UNIT:** 1655

**TITLE:** METHOD FOR PREVENTING FUNGAL GROWTH IN PLANTS

**COMMISSIONER FOR PATENTS**  
**P.O. Box 1450**  
**Alexandria, VA 22313-1450**

Dear Sir:

In response to the Office Action dated 11/15/2006, please consider the following:

### REMARKS

In response to the Office Action dated November 15 2006, please consider the following amendments and remarks made in a good faith attempt to move prosecution of this application forward to a proper allowance of the claims.

A one month extension of time to respond, pursuant to 37 C.F.R. 1.136 is hereby requested, and a check for the fee for same is enclosed herewith in the amount of \$55.00.

Applicant respectfully urges that at least the newly submitted claims are allowable over the cited prior art (Hsu and Fliermans). In line with In Re Kumar, 418 F.3d 1161 (2005), it is respectfully submitted that Hsu is non-enabled prior art. In other words, by providing a range of "5-98%" in garlic concentrate, Hsu essentially specifies no enablement at all. Research at the behest of Applicant reveals that only the range of between approximately 10% and 30% is efficacious (less than about 10% appears to be ineffective, and more than about 30% is deleterious to many plant species. Hsu's disclosure is further compromised as an effective reference by his teaching that garlic is to be combined with "essential oils" between 2% and 95%. Hsu appears only to even arguably possess an invention which relies on the combination of garlic and essential oils, and teaches essentially any combination might be tried.

Hsu objectively fails to grasp that garlic, as the lone essential ingredient, in a essentially inert, aqueous medium, when applied at the concentration levels taught by the present application, is effective as a fungicide. At all times, Hsu teaches and claims the combination of garlic with other active ingredients.

By substituting the newly herein submitted claims, which are written in "consisting essentially of...." language format, it is believed that the Hsu reference is adequately distinguished.

As for the Section 103 Fliermans reference, it is respectfully noted that such reference post-dates the priority date of the present application, and its disclosure as enables the existing and newly submitted claims.

In view of the foregoing, allowance of the newly submitted claims 16 - 21 is requested. If issues which stand in the way of such allowance remain, and a telephone call or interview is reasonably likely to resolve same, a telephone call is requested - (254-498-1431).

### CLAIM AMENDMENTS

I claim:

1. (Canceled) A method for controlling fungal infestation of plants comprising the steps of:  
  
selecting a composition comprising garlic extract and a liquid carrier;  
  
applying said composition to a plant.
  
2. (Canceled) The method of claim 1 wherein said composition contains between approximately 10% to 30% of garlic extract by volume.
  
3. (Canceled) The method of claim 1 wherein said carrier in said composition consists essentially of water.
  
4. (Canceled) The method of claim 2 wherein said carrier in said composition consists essentially of water.
  
5. (Canceled) A method for inhibiting fungal growth in a host medium comprising the steps of:  
  
selecting a composition comprising garlic extract and a liquid carrier;  
  
applying said composition to said host medium.
  
6. (Canceled) The method of claim 5 wherein said composition contains between approximately 10% to 30% of garlic extract by volume.



7. (Canceled) The method of claim 5 wherein said carrier in said composition consists essentially of water.

8. (Canceled) The method of claim 6 wherein said carrier in said composition consists essentially of water.

9. (Canceled) A fungicide consisting essentially of garlic extract and a inert liquid carrier.

10. (Canceled) The method of claim 9 wherein said composition contains between approximately 10% to 30% of garlic extract by volume.

11. (Canceled) The method of claim 9 wherein said carrier in said composition consists essentially of water.

12. (Canceled) The method of claim 10 wherein said carrier in said composition consists essentially of water.

13. (Canceled) A method for inhibiting fungal grown in turf grass comprising the steps of:

selecting a composition comprising garlic extract and a liquid carrier;

applying said composition to said turf grass.

14. (Canceled) The method of claim 5 wherein said composition contains between approximately 10% to 30% of garlic extract by volume.

15. (Canceled) The method of claim 5 wherein said carrier in said composition consists essentially of water.

16. (New Claim) A method for treating plants and plant growth media for inhibiting fungal propagation comprising the steps of:

selecting a composition consisting essentially of garlic extract in an aqueous liquid carrier;

applying said composition to a plant or its growth medium.

17. (New Claim) The method of claim 16 wherein said garlic extract constitutes between approximately 10% to 30% of said composition by volume.

18. (New Claim) A liquid fungicide consisting essentially of garlic extract and water.

19. (New Claim) The fungicide of Claim 18 wherein said garlic extract constitutes between approximately 10% to 30% of said fungicide by volume.

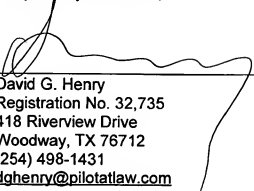
20. (New Claim) A method for preventing the propagation of the fungal species of Pythium, Phytophthora, Rhizoctonia and Fusarium comprising the steps of:

selecting a composition consisting essentially of garlic extract in an aqueous liquid carrier;

applying said composition to a plant or its growth medium.

21. (New Claim) The method of claim 20 wherein said garlic extract constitutes between approximately 10% to 30% of said composition by volume.

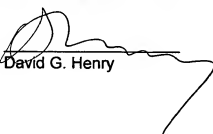
Respectfully submitted,



\_\_\_\_\_  
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CERTIFICATE OF  
MAILING

I hereby certify that this correspondence is being deposited with the United States Postal Service as First Class Mail in an envelope addressed to: MAIL STOP NON-FEE AMENDMENT, COMMISSIONER FOR PATENTS, P.O. Box 1450, Alexandria, VA 22313-1450, on this the 4<sup>th</sup> day of Oct., ~~March~~, 2007



\_\_\_\_\_  
David G. Henry